

Decision 03-06-010 June 5, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Frameworks.

Rulemaking 93-04-003
(Filed April 7, 1993)

Investigation on the Commission's Own Motion Into open Access and Network Architecture Development of Dominant Carrier Networks.

Investigation 93-04-002
(Filed April 7, 1993)

OPINION ON REQUEST FOR INTERVENOR COMPENSATION

This decision grants The Utility Reform Network (TURN) an award of \$147,262.12 in compensation for substantial contributions to Decision (D.) 03-01-077. In that decision, the Commission set the permanent rate for a line shared loop as an unbundled network element (High Frequency Portion of the Loop, or "HFPL UNE"), settled the distribution of true-up amounts from the interim rates, reaffirmed its independent state jurisdiction over unbundling for advanced services, and created a pricing policy for new unbundled network elements using fiber facilities.

1. Background

The Open Access and Network Architecture Development (OANAD) docket is comprised of several phases related to implementing local telephone competition in California. The Commission issued D.03-01-077 in the "Permanent Line Sharing Phase" of the OANAD docket. The Permanent Line Sharing Phase was initiated as the result of an arbitration between numerous

competitive carriers and Pacific Bell (now SBC California) and Verizon California Inc. (Verizon) on the issues of pricing and terms and conditions for access to the HFPL UNE. That arbitration, also in the OANAD docket, culminated with D.00-09-074 setting interim rates and terms and conditions for the HFPL UNE. The decision described the upcoming line-sharing phase as follows:

“The line-sharing phase of this proceeding remains open to determine:

- a. Final prices, including the issue of double recovery of loop costs and disposition of balances in memoranda accounts.
- b. The number of tie cables in an efficient line sharing configuration;
- c. Whether or not to continue the limitation on decommissioning copper local loop plant pending resolution of line sharing or transport over fiber facilities; and
- d. Other issues only to the extent specifically added by the Administrative Law Judge.” (D.00-09-074, Ordering Paragraph 2.)

The Commission’s work in the Permanent Line Sharing Phase, and TURN’s participation in this phase, began almost immediately after issuance of D.00-09-074. For the next several months, parties to the case, including TURN, participated in meetings to sort out factual and technical questions that were a prerequisite to addressing line sharing issues, particularly pricing. In a process that took several months, the parties sought to develop an agreed-upon picture of the network configuration and a standardized set of cost elements in order to set the price for HFPL UNE on both copper and fiber loops.

TURN brought in an outside counsel and an expert witness to assist in preparation for the pricing and technical issues that were to be the scope of the Permanent Line Sharing Phase of OANAD. On May 2, 2001, the Administrative Law Judge (ALJ) held a prehearing conference and made an oral ruling bifurcating the HFPL issues into roughly two categories: 1) pricing of the HFPL on both copper and fiber loops, and 2) terms and conditions of access to the

HFPL on fiber loops. The two phases continued in tandem for several more months, but the pricing issues were given the higher priority. TURN presented testimony and briefs on the pricing of the HFPL UNE in June, July and August 2001. The proposed decision on the pricing issues was issued in May 2002, and, after a series of revisions and alternate decisions, the final decision (D.03-01-077) was adopted in January 2003.

Consistent with the requirement of Pub. Util. Code § 1804(c), TURN filed this request for compensation within 60 days of the date of issuance of D.03-01-077. No party has opposed TURN's request for compensation.

2. Requirements for Awards of Compensation

Intervenors who seek compensation for their contributions in Commission proceedings must file requests for compensation pursuant to Pub. Util. Code §§1801-1812. Pub. Util. Code § 1804(a) requires an intervenor to file a notice of intent (NOI) to claim compensation within 30 days of the prehearing conference or by a date established by the Commission. TURN filed a timely NOI in this proceeding.

Section 1804(c) requires an intervenor requesting compensation to provide "a detailed description of services and expenditures and a description of the customer's substantial contribution to the hearing or proceeding."

Section 1802(h) states that "substantial contribution" means that,

in the judgment of the commission, the customer's presentation has substantially assisted the Commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. Where the customer's participation has resulted in a substantial contribution, even if the decision adopts that customer's contention or recommendations only in part, the commission may award the customer compensation for all reasonable advocate's fees,

reasonable expert fees, and other reasonable costs incurred by the customer in preparing or presenting that contention or recommendation.

Section 1804(e) requires the Commission to issue a decision that determines whether or not the customer has made a substantial contribution and the amount of compensation to be paid. The level of compensation must take into account the market rate paid to individuals with comparable training and experience who offer similar services, consistent with § 1806.

3. Contributions to Resolution of Issues

TURN's participation in this proceeding meets the Commission's criteria for determining whether an intervenor has made a substantial contribution to a Commission decision. TURN submitted opening and reply testimony on a variety of issues related to the pricing of HFPL UNE. The Commission's final decision discussed and considered TURN's proposals and policy position at length and adopted a key TURN position on pricing of the HFPL UNE on a fiber (next generation digital loop carrier, or NGDLC) network. In addition, the ALJ's Proposed Decision, Revised Proposed Decision and further Revised Proposed Decision adopted several of the recommendations made by TURN's expert witness and were considered in the Alternate Decision that was finally adopted.

3.1 Importance to Consumers

TURN takes the position that the price for unbundled network elements is an important consumer issue. First, it states, unreasonably high prices for unbundled network elements will discourage competitors from entering the California market. Second, because there is a legal requirement that UNE rates must be set at the long run incremental cost, the Commission must make factual determinations as to incumbents' costs of these elements. TURN states that these

determinations affect consumers when the Commission considers an incumbent's application to raise or lower rates for retail service.

In the Permanent Line Sharing Phase, it was TURN's position (and ultimately the Commission's decision) that the incumbent carriers were advocating unreasonably high rates for the HFPL UNE. TURN argued that, if adopted, these high rates would deter competitive carriers and force them to forgo the residential market.

TURN also took the position that the competitors were advocating unreasonably low HFPL rates in the form of a zero charge. TURN argued that a zero charge for the HFPL UNE would not accurately reflect the incumbents' costs of provisioning the UNE (the main cost being that of the local loop) and would leave captive local exchange voice customers continuing to foot the entire bill for the local loop. While the Commission eventually adopted a zero HFPL UNE rate, TURN's arguments were given careful consideration in the decision. TURN notes that it has filed an application for rehearing on this issue.

3.2 TURN's Contribution to D.03-01-077

In the Permanent Line Sharing Phase of this case, the Commission examined two technical scenarios for competitive local exchange carrier (CLEC) access to the HFPL. Under the first scenario, the HFPL UNE is on a loop that is copper from the customer premises to the incumbent's central office. Under the second scenario, the HFPL UNE is copper only from the customer premises to a remote terminal in the field where the loop is combined with other loops using next-generation (or NGDLC) technology. With NGDLC, the CLEC customer's traffic that was once on the HFPL UNE is combined with other customer traffic onto a fiber facility from the remote terminal back to the central office.

Through its expert witness, TURN urged the Commission to adopt a positive price for the HFPL UNE under both technical arrangements (all copper or NGDLC). In D.03-01-077, the Commission discussed and explicitly adopted TURN's position as to the NGDLC, stating:

TURN urges that the Commission's determination on the threshold issue of whether a monthly recurring charge should be assessed for the HFPL UNE should also apply to line sharing over fiber-fed loops in a Next Generation Digital Loop Carrier (NGDLC) network architecture. We believe that it should. (D.03-01-077, at 36.)

According to TURN, the Commission's determination that carriers must pay a positive price when the HFPL UNE rides on NGDLC is particularly important in light of the role that fiber facilities will play in the deployment of advanced services in California. TURN states that even more important for its constituency of residential customers and small businesses is the fact that even basic voice services will eventually be just another set of data riding over these fiber facilities.

3.3 Contribution to Proposed Decision

The Commission has previously determined that an intervenor's contribution to a final decision may be supported by contributions to the ALJ's Proposed Decision, even where the Commission's final decision does not mirror the Proposed Decision on a particular issue. (*See* D.99-11-006, at 9-10; D.01-06-063, at 6-7.)

The Proposed Decision in this case adopted a number of TURN's proposals. For example, the Proposed Decision concluded that a zero monthly charge for the HFPL UNE could be a violation of Section 254(k) of the Telecommunications Act of 1996; that the "economically correct" outcome is to

have a positive price for access to the HFPL, and that TURN's application of an economic theory (Shapley Values) was appropriate for pricing HFPL.

The Proposed Decision also explicitly "agrees with TURN's conclusion that the introduction of a charge for the HFPL allows Pacific and Verizon to collect another charge for the use of the loop, thereby providing them with 'double recovery.'" (Proposed Decision, at 39.) The Proposed Decision again looked to TURN's arguments to determine that some form of refund mechanism is appropriate to solve the double recovery problem, although the Proposed Decision did not adopt TURN's specific refund proposal.

4. Did TURN Make a Substantial Contribution?

In addition to TURN's contribution to the Proposed Decision and the Commission's adoption of TURN's position on the NGDLC issue, we find that TURN has contributed substantially in this proceeding based on the totality of TURN's work. It is clear that TURN's efforts comprised a comprehensive package that directly influenced the outcome of the decision. In D.95-08-051, addressing TURN's request for compensation after the rate design phase of Order Instituting Investigation 87-11-033, we noted that:

Even where its positions were not adopted, TURN's participation was useful in focusing our decision on potential problems and competing positions. When competently advocated, as TURN's positions were, this participation performs a valuable function and should be encouraged. (D.95-08-051, at 2.)

TURN participated actively and incurred substantial expenses in this proceeding. It worked with the other parties to set the scope of the proceeding, and it filed extensive opening and reply testimony and comprehensive opening and reply briefs. TURN engaged outside counsel and an expert witness to assist in these efforts. The Proposed Decision reflects the substantial amount of work

by TURN to adequately represent consumer interests. While the Commission ultimately adopted an Alternate Decision, it is clear that the Commission in its deliberations carefully considered the Proposed Decision and its reliance on TURN's evidence.

Given the purpose and scope of the proceeding, the merits of TURN's compensation request should be judged in substantial part on whether its participation helped the Commission carry out its responsibilities. We conclude that TURN contributed to the Commission's decision-making process by ensuring a full discussion of different substantive positions. The record demonstrates that TURN contributed substantially to the development of a quality record, particularly on the issues of costing and pricing.

We find further that no reduction of compensation for duplication is warranted on this record. Alone among the parties, TURN and the Office of Ratepayer Advocates (ORA) represented the interests of consumers. While some overlap was unavoidable, TURN and ORA took steps to keep duplication to a minimum and to ensure that when it did happen, the work served to complement and assist the showings of the other party.

TURN acknowledges that it is difficult to assign a dollar value to the benefits achieved through its contribution to D.03-01-077. However, TURN urges, and we agree, that the costs claimed here are far outweighed by the value of TURN's contribution to the development of a quality record in this important proceeding.

5. Reasonableness of Requested Compensation

TURN requests compensation for all of the time and expenses reasonably devoted to its participation in this proceeding, for a total request of \$147,262.12.

Advocate's Fees

R. Costa	28.50 Hours	X	\$160 (2000)	=	\$ 4,560
R. Costa	238.55 Hours	X	\$180 (2001)	=	\$42,939
R. Costa	129.45 Hours	X	\$200 (2002)	=	\$25,890
R. Costa	34.75 Hours	X	\$200 (2003)	=	\$ 6,950
R. Manifold	63.00 Hours	X	\$280 (2001-02)	=	\$17,640
R. Manifold	27.00 Hours	X	\$140 (Travel)	=	\$ 3,780
C. Mailloux	62.40 Hours	X	\$275 (2002-03)	=	\$17,160
C. Mailloux	18.00 Hours	X	\$137.50 (Comp)	=	\$ 2,475
J. Anthony	28.50 Hours	X	\$190 (2001)	=	\$ 5,415
R. Finkelstein	8.00 Hours	X	\$170 (2003)	=	\$ 1,360
SUBTOTAL					= \$128,169

Consultant's Fees

T. Roycroft	100 Hours	X	\$135 (2001-03)	=	\$ 13,500
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Other Costs

Copies	=	\$3,049.54
Fed Ex	=	\$ 384.84
Lexis	=	\$ 33.66
Postage	=	\$ 278.27
Travel	=	\$ 853.50
Parking/Toll	=	\$ 354.76
Meals/Lodging	=	\$ 638.55

SUBTOTAL = \$ 5,593.12

TOTAL REQUESTED = \$147,262.12

5.1 Hours Claimed

TURN has presented its attorney, advocate and consultant hourly records in an appendix to the request for compensation. The information reflects the hours devoted to reviewing the records, drafting briefs and responses, and participating in hearings and other proceedings. Consistent with Commission policy, TURN billed half of its attorney rate for time related to preparation of this compensation request and for out-of-town travel time. The hours TURN claims are reasonable.

5.2 Hourly Rates

Section 1806 requires the Commission to compensate eligible parties at a rate that reflects the “market rate paid to persons of comparable training and experience who offer similar services.”

TURN requests an hourly rate for Regina Costa of \$160 for her work in 2000, \$180 for work in 2001, and an increase to \$200 for work performed in 2002 and 2003. The rates for 2000 and 2001 have been approved by the Commission in earlier cases. (*See* D.01-08-011 and D.02-04-013.) TURN states that there had been no increase in the hourly rates sought for Costa’s work from 1996 to 2000, and it asserts that the combination of inflation and Costa’s increasing skills and responsibilities provide support for the reasonableness of the \$200 rate sought for 2002. Costa has an advanced degree in telecommunications and nearly 20 years of experience in research, analysis, advocacy and expert testimony in the field of telecommunications. With the departure of TURN’s senior telecommunications attorney at the end of 2000, she assumed responsibility for formation and presentation of TURN’s positions on telecommunications matters. TURN compares Costa’s training and experience to that of Beth Kientzle and Scott Cratty. Cratty received a 1999 rate of \$175/hour and Kientzle received a 2000 rate of \$180/hour. TURN states that Costa has more experience as well as a specialized telecommunications degree as compared to Kientzle. TURN considers Cratty and Costa to be peers in terms of experience, but Costa holds an advanced degree in telecommunications that Cratty does not. Thus, TURN asserts that Costa’s rate for 2002 and 2003 should increase to \$200/hour to reflect her additional experience and training as compared to other experts providing similar services. The requested rate is reasonable and is approved.

In the latter months of 2000, TURN lost two experienced staff attorneys responsible for telecommunications work at the same time that this phase of the OANAD proceeding was becoming active. TURN retained Robert Manifold as outside counsel to assist with the development and presentation of TURN's recommendations on line sharing issues, including the HFPL costing and pricing issues. After Christine Mailloux joined TURN's staff as an attorney, she assumed primary responsibility for this phase and Manifold's work on TURN's behalf ended. Manifold's billing rate to TURN was \$280 per hour, which TURN asserts is a reasonable sum substantially below comparable market rates for an attorney of Manifold's training and experience. Manifold was a 1971 graduate of Stanford's Law School and had more than 15 years of experience in the field of utility regulation, including service as chief of the Public Counsel section of the Washington State Attorney General's office from 1993-1999. He had recently left that office and entered private practice, with a substantial portion of his practice devoted to representing consumer organizations in regulatory proceedings. TURN notes that the reasonableness of the requested \$280 rate for Manifold is demonstrated by comparing his experience with that of TURN attorney Robert Finkelstein, whose approved hourly rate for work performed during 2000 was \$280, and increased to \$310 in 2001. (*See* D.00-11-002 and D.01-06-070.) We agree that the rate sought for Manifold's work is reasonable.

TURN requests an hourly rate of \$275 for the work of attorney Christine Mailloux in 2002 and 2003, an increase from the \$250 rate we authorized for her for work performed in 2001. (*See* D.03-05-027.) Mailloux earned her law degree in 1993 and worked for the Privacy Rights Clearinghouse immediately thereafter. Mailloux joined Blumenfeld & Cohen in 1996, representing CLECs in state commission proceedings. In 1999, she became assistant general counsel of

regulatory affairs at NorthPoint Communications. Immediately before coming to TURN, she consulted with a telecommunications equipment manufacturer on state and federal regulatory issues, intervening on its behalf in several FCC proceedings. TURN states that Mailloux's responsibility at TURN increased substantially in 2002 and she assumed responsibility for more substantial cases. She has served as lead attorney in cases such as the Commission's Telecommunications Bill of Rights proceeding, the rulemaking on predictive dialers (R.02-02-020) and the proceeding that is the subject of this request on the pricing of the HFPL. In view of her experience, TURN asserts that her hourly rate should be commensurate with that of a senior associate or junior partner at a firm. TURN submits an Of Counsel survey of attorney fees showing that a \$275 rate is below the low-end rates for partners reported in the 2000/2001 period. The rate requested is reasonable and is approved.

Trevor R. Roycroft served as TURN's expert witness. The \$135 requested for his work reflects the actual billed costs that TURN incurred. Roycroft is a tenured associate professor with the J. Warren McClure School of Communications Systems Management at Ohio University. He has been with the university since 1994. Previously, he was chief economist for the Indiana Office of Consumer Counselor, responsible for research and testimony in gas, water, electric and telecommunications cases. He has a Ph.D. (1989) and master's degree (1986) in economics from the University of California at Davis, and he has published numerous articles on telecommunications regulatory policy and the effect of the Telecommunications Act of 1996 on competitive entry. TURN asserts that Roycroft's rate is substantially below the rates approved by the Commission for other expert witnesses. (*See* D.01-10-008, D.01-08-010.) We deem the \$135 rate reasonable.

TURN requests an hourly rate of \$190 per hour for the work of James Anthony, a telecommunications staff attorney with TURN from April 2001 to September 2002. The Commission has already approved this rate for work performed in 2001 by Anthony in two previous compensation requests. (*See* D.02-04-007, D.02-04-013.) The \$190 rate is reasonable.

Robert Finkelstein is an experienced supervising attorney, and the \$340 rate requested has previously been approved by this Commission for work in the year 2002. (*See* D.03-01-074.) Because of the small number of hours devoted to supervising this compensation request, TURN asserts that it is appropriate to apply the 2002 rate to 2003 work, since the 50% cap for work on preparation of compensation requests will effectively reduce the rate to \$170. We agree.

We find that the rates requested by TURN for its advocates and expert witness are reasonable and reflect market rates for individuals of similar experience and qualifications.

5.3 Other Costs

TURN claims \$5,593.12 in administrative and other miscellaneous expenses associated with its work performed in connection with D.03-01-077. We have examined the documentation supporting these requests. We find them reasonable.

6. Award

We award TURN \$147,262.12 for its substantial contributions to D.03-01-077. Consistent with previous Commission decisions, we will order that interest be paid on the award amount (calculated at the three-month commercial paper rate), commencing the 75th day after TURN filed this compensation request (the 75th day will be June 23, 2003) and continuing until full payment of the award is made.

The award granted today should be paid by SBC California and Verizon pursuant to Pub. Util. Code § 1807, and we will assess responsibility for payment in accordance with the respective 2002 California jurisdictional revenues of SBC California and Verizon.

7. Waiver of Comment Period

This is a compensation matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code § 311(g)(3), the otherwise applicable 30-day review and comment period is being waived.

8. Assignment of Proceeding

Carl W. Wood was the Assigned Commissioner and Karen Jones was the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. TURN timely requests compensation for contributions to D.03-01-077, as set forth herein.
2. TURN requests hourly rates for its advocates and expert witness that have either been approved earlier by the Commission or that now are found to be reasonable based on a comparison to market rates for individuals of similar experience and qualifications.
3. The miscellaneous costs incurred by TURN in this proceeding are reasonable.

Conclusions of Law

1. TURN has fulfilled the requirements of Pub. Util. Code §§ 1801-1812, which govern awards of intervenor compensation.
2. TURN should be awarded \$147,262.12 in compensation for substantial contributions to D.03-01-077.

3. This order should be effective today so that TURN may be compensated without unnecessary delay.

O R D E R

IT IS ORDERED that:

1. The Utility Reform Network (TURN) is awarded \$147,262.12 as set forth herein for substantial contributions to Decision (D.) 03-01-077.

2. The award should be paid pursuant to Pub. Util. Code § 1807 by SBC California and Verizon California Inc. in accordance with their respective 2002 California jurisdictional revenues. Interest shall be paid at the rate earned on prime, three-month commercial paper as reported in the Federal Reserve Statistical Release, H.15, with interest beginning on June 23, 2003, and continuing until the full payment has been made.

This order is effective today.

Dated June 5, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

Compensation Decision Summary Information

Contribution Decision(s):	D0306010
Proceeding(s):	R9304003/I9304002
Author:	ALJ Jones
Payer(s):	SBC California/Verizon California Inc

Intervenor Information

Intervenor	Claim Date	Amount Requested	Amount Awarded	Reason Change/Disallowance
The Utility Reform Network	4/11/03	\$147,262.12	\$147,262.12	

Advocate Information

First Name	Last Name	Type	Intervenor	Hourly Fee Requested	Year Hourly Fee Requested	Hourly Fee Adopted
Regina	Costa	Policy Expert	The Utility Reform Network	\$160	2000	\$160
Regina	Costa	Policy Expert	The Utility Reform Network	\$180	2001	\$180
Regina	Costa	Policy Expert	The Utility Reform Network	\$200	2002	\$200
Regina	Costa	Policy Expert	The Utility Reform Network	\$200	2003	\$200
Robert	Manifold	Attorney	The Utility Reform Network	\$280	2001	\$280
Robert	Manifold	Attorney	The Utility Reform Network	\$280	2002	\$280
Christine	Mailloux	Attorney	The Utility Reform Network	\$275	2002	\$275
Christine	Mailloux	Attorney	The Utility Reform Network	\$275	2003	\$275
James	Anthony	Attorney	The Utility Reform Network	\$190	2001	\$190
Robert	Finkelstein	Attorney	The Utility Reform Network	\$340	2003	\$340
Trevor	Roycroft	Policy Expert	The Utility Reform Network	\$135	2001	\$135
Trevor	Roycroft	Policy Expert	The Utility Reform Network	\$135	2002	\$135
Trevor	Roycroft	Policy Expert	The Utility Reform Network	\$135	2003	\$135